2006

State of Utah v. Andrew Brink : Brief of Appellee

Utah Court of Appeals

Debra M. Nelson; John West; Salt Lake Legal Defender Association; Counsel for Appellant.
Jeffrey S. Gray; Assistant Attorney General; Mark L. Shurtleff; Utah Attorney General; Michael S. Colby; Salt Lake District Attorney's Office; Counsel for Appellee.

Case No. 20060954-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Andrew Brink,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for aggravated robbery, a first degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Sheila K. McCleve presiding

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

MICHAEL S. COLBY
Salt Lake District Attorney's Office

Counsel for Appellee

DEBRA M. NELSON
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111

Counsel for Appellant

Case No. 20060954-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Andrew Brink,
Defendant/Appellant.

Brief of Appellee

Appeal from a conviction for aggravated robbery, a first degree felony, in the Third Judicial District Court of Utah, Salt Lake County, the Honorable Sheila K. McCleve presiding

JEFFREY S. GRAY (5852)
Assistant Attorney General
MARK L. SHURTLEFF (4666)
Utah Attorney General
160 East 300 South, 6th Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854
Telephone: (801) 366-0180

MICHAEL S. COLBY
Salt Lake District Attorney's Office

Counsel for Appellee

DEBRA M. NELSON
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111

Counsel for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES

STATE RULES

Case No. 20060954-CA

IN THE

UTAH COURT OF APPEALS

State of Utah,
Plaintiff/Appellee,

vs.

Andrew Brink,
Defendant/Appellant.

Brief of Appellee

STATEMENT OF JURISDICTION

Defendant appeals from a conviction for aggravated robbery, a first degree felony, in violation of Utah Code Ann. § 76-6-302 (West 2004). This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (2002).

STATEMENT OF THE ISSUE

Did the trial court act within its discretion in excluding expert testimony on the deficiencies of eyewitness identification, where the court invited counsel to submit jury instructions tailored to the proposed expert testimony?

Standard of Review. "Whether expert testimony on the inherent deficiencies of eyewitness identification should be allowed is within the sound discretion of the trial court." *State v. Butterfield*, 2001 UT 59, ¶ 43, 27 P.3d 1133; *accord State v. Hollen*,

2002 UT 35, ¶ 66, 44 P.3d 794 (holding that "'[t]he trial court has wide discretion in determining the admissibility of expert testimony'" on eyewitness identification) (quoting *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993)). Under this standard, the appellate court will not reverse a trial court's decision to admit or exclude expert testimony absent an abuse of discretion, that is, "'unless the decision exceeds the limits of reasonability.'" *Hollen*, 2002 UT 35, ¶ 66 (quoting *Larsen*, 865 P.2d at 1361).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE, CONFUSION, OR WASTE OF TIME

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

RULE 702. TESTIMONY BY EXPERTS

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

Defendant was charged with aggravated robbery, a first degree felony, with a sentencing enhancement for using a dangerous weapon. R. 1-3. After being bound over for trial following a preliminary hearing, defendant filed a notice that he would call as an expert witness Dr. David Dodd, Associate Professor of Psychology at the University of Utah. R. 30-31, 42. The State filed a motion in limine to exclude Dr. Dodd's proposed testimony on eyewitness identification. R. 73-84. After holding an evidentiary hearing, the trial court granted the State's motion and excluded the testimony, but invited counsel to submit modified *Long* instructions "in light of the evidence presented regarding eyewitness identification." R. 289-90. Following a two-day trial, a jury convicted defendant as charged. R. 324-25. Defendant moved to arrest judgment, but that motion was denied. R. 366-67; *see* R. 377-78. Defendant was sentenced to an indeterminate prison term of six years to life. R. 377-78. He timely appealed, and the Utah Supreme Court transferred the appeal to this Court pursuant to rule 42(a), Utah Rules of Appellate Procedure. R. 379-80, 388-89.

B. Statement of Facts

The Robbery

On the evening of October 5, 2005, Alicia Warnock went to the Breathe Day Spa for her once-a-month "facial." R. 395: 13-14. Therapist Amber Devoge finished

Warnock's facial at approximately 8:00 p.m. and the two women walked to the front of the spa to look at some facial products. R. 395: 16, 66; R. 396: 121-22. While discussing some of the products, Warnock's attention was drawn to two men standing just outside the glass double doors to the spa. R. 395: 17. The men, who were "at most" four or five feet away from Warnock, "caught [her] eye" because they did not appear to be "your typical spa client." R. 395: 17-18. One wore a navy blue sweatshirt with a navy blue bandana or beany on his head ("Blue") and the other wore a white or gray sweatshirt with a white bandana on his head ("White"). R. 395: 18, 77; R. 396: 118. Warnock also noticed the men because "[t]hey just looked really anxious" and "looked like they weren't sure what they were doing." R. 395: 18. They "looked like they were scoping out the place." R. 395: 17.

After looking at the two men "for a minute," Warnock surmised that they may be boyfriends of spa employees and turned her attention back to Devoge. R. 395: 18. But Warnock had a "weird feeling" about the men and again looked back at them. R. 395: 18. As she did, they opened the door and walked into the spa with handguns drawn. R. 395: 18-19. With one arm covering his nose and mouth, White walked to the front counter. R. 395: 19-21, 62. Blue told Warnock and Devoge to step aside and directed them to a waiting area near the front counter. R. 395: 19-21, 30, 88; R. 396: 122. With his handgun drawn, he ordered the women to sit on the sofa, "making sure that [they] stood still." R. 395: 20, 29-31; R. 396: 126. Although

Blue repeatedly told the women to look down, Warnock did not comply because, as a bank employee, she knew to "look for clues like that with robbers." R. 395: 21.

Meanwhile, with his gun still drawn and an arm partially covering his face, White ordered Octavia Martucci and Sunni Jackson, who were working behind the front counter, to give him "all the money." R. 395: 64; R. 396: 120-21. When the two women did not immediately respond to White's demand, he again demanded that they give him the money and cocked his gun or disengaged the safety. *See* R. 395: 84, 91; R. 396: 121. Martucci opened the cash register, removed the cash, and handed it to White. R. 395: 66-68, 78, 84. White moved his arm away from his face, reached out, and took the money from Martucci. R. 395: 24, 68, 84.[1] White then directed Martucci and Jackson to the waiting room where Warnock and Devoge were sitting and ordered the women to lie down on the ground. R. 395: 70. The two men then fled the spa. R. 395: 24, 70, 85. After waiting several seconds, the four women arose, locked the spa, and called police. R. 395: 24.

---

[1] In her witness statement to police, Martucci wrote that she gave the money to Blue, but at trial, she testified that she gave the money to White. R. 395: 66-68, 78-80, 84; DE2a. She explained that she made the mistake because at the time, she was upset and "frazzled." R. 395: 90, 92. Warnock confirmed Martucci's trial testimony that White took the money. R. 395: 24. Initially, Jackson testified that Blue took the money, but later, she testified that she "really can't remember" who took the money. R. 396: 123, 126. She confirmed, however, that White "was the one that was closest to [her] and asked [her] for the money." R. 396: 126.

The Investigation

The following day, sheriff's deputies arrested Timothy Dorrell for the robbery. R. 395: 102. After his arrest, Dorrell identified "Andy" as his accomplice and told police that Andy lived in an apartment building (about a half block from the police station) in a bottom floor apartment across from the laundry room. R. 395: 102. [2] The next day, Officer Brad Burningham of the Salt Lake City Police Department identified the apartment address, traced the apartment to Angela Newton, and confirmed that Andrew Brink, the defendant here, lived with her at the apartment. R. 395: 34-36, 41-42.

After verifying the residence information, Officer Burningham and a second officer went to the apartment to question defendant. R. 395: 37. After defendant's girlfriend admitted the officers inside, Officer Burningham asked to speak with defendant in the outside hallway. R. 395: 37. Initially, defendant was calm, but "[v]ery rapidly and increasingly, his demeanor became . . . very, very agitated . . . ." R. 395: 37-38. Fearing a confrontation, Officer Burningham handcuffed defendant. R. 395: 38. After briefly speaking with defendant's girlfriend, Officer Burningham

---

[2] Less than three months later, Dorrell pled guilty to the aggravated robbery. R. 395: 93, 102-03. Two months after his plea, Dorrell changed his story to implicate a "Jeffrey Chris," rather than defendant, as his accomplice. R. 395: 103. At defendant's trial, Dorrell claimed that he falsely implicated defendant because the two were having troubles as friends and he believed he would receive a more favorable sentence. R. 395: 100-01.

took defendant to the police station for questioning. R. 395: 38. There, defendant waived his *Miranda* rights and agreed to speak with Officer Burningham. R. 395: 40. He denied any involvement in the robbery, but admitted to knowing Dorrell and being with Dorrell for a time on the night of the robbery. R. 395: 41, 49. Defendant was not arrested for the robbery at the time, but was taken to jail on a "small warrant." R. 395: 41-42.

A few days later, Officer Burningham compiled a "six-pack photo spread" that included a photograph of defendant. R. 395: 43-44. He and Detective Ken Schoney then went to the Breathe Day Spa to present the photo spread to spa employees Martucci and Jackson. R. 395: 45, 50. He presented the photo spread first to Martucci, and then to Jackson, each outside the presence of the other. R. 395: 46. Before asking Martucci to review the photo spread, Officer Burningham told her that the suspect may or may not be present. R. 395: 46, 73, 85-86, 91. Martucci reviewed the photo spread and identified defendant (top right, number 3) as White—the robber who demanded the money. R. 395: 73-74, 86. As instructed, she drew a box around defendant's photo and signed her name next to that photo. R. 395: 47, 73-74; SE1. She also rated her confidence level as a 7 on a scale of 1 to 10. R. 395: 47, 74, 86; SE1. Martucci later testified at trial that her confidence level increased when she saw defendant in person at two pretrial hearings, and that she was "very certain" when she saw defendant at trial. R. 395: 74-76, 87-88. Jackson

was unable to make an identification when presented with the photo spread, explaining that she never got a good look at White's face. *See* R. 396: 127.

Detective Schoney also presented a photo spread that included defendant's photograph to Alicia Warnock. R. 395: 105-06. She was unable to identify defendant or anyone else as one of the robbers. R. 395: 31, 106. At trial, however, Warnock identified defendant as White—the man who demanded the money from the cash register. R. 395: 23. When defense counsel presented Martucci with an enlarged photograph of Jeffrey Chris—the man defendant later implicated in the robbery—she testified he was not the person who robbed her at the spa. R. 395: 108.

C. Evidentiary Hearing on Motion to Exclude Expert Testimony on Eyewitness Identification.

Dr. David Dodd received his Ph.D. in psychology at the University of Colorado and is an associate professor of psychology at the University of Utah. R. 393: 5-6. He has reviewed the literature on eyewitness perception and memory and has conducted some of his own research on the topic. R. 393: 5-6. He has testified as an expert witness on eyewitness identification in federal and state courts in Utah and state courts in Colorado. R. 393: 6. In preparation for his testimony at the hearing, Dr. Dodd reviewed the police reports, the photo spread used by police, and the testimony from the preliminary hearing. R. 393: 7.

Dr. Dodd explained that the memory process is divided into three phases: acquisition, retention, and retrieval. R. 393: 10.

Acquisition. Dodd identified four concerns during the acquisition phase of the witnesses in this case: (1) the partial covering of the face (a form of disguise) "disrupts to some degree the accuracy" of an identification, and in this case, White held his arm over his face, R. 393: 10, 12-13; (2) White's face was "only seen very briefly" when he took the money from Martucci, R. 393: 10, and in addition, witnesses tend to exaggerate the time period they actually observed the perpetrator, especially when their identification is confirmed by the officer, R. 393: 19-20; (3) a witness's ability to acquire information is "disrupted" when they are "highly stressed"; and (4) witnesses "do more poorly when a weapon is present" because they "spend a lot of their time looking at the weapon rather than . . . at the face" of the perpetrator (distraction), R. 393: 12, 21-22.

Retention. Dodd testified that during the retention stage, memory may change due to the passage of time, as when a witness forgets details. R. 393: 13. He testified that memory may also be altered during the retention stage through "suggestion." R. 393: 13. He identified five protocols that minimize this risk: (1) witnesses should be told that the suspect may or may not be in the photo spread (witnesses are otherwise likely to make an identification regardless), R. 393: 13-15; (2) the foils in a photospread should match the description given by the witness, not the suspect, R. 393: 15; (3) officers should employ "double-blind" testing, where the officer administering the photo spread does not know which of the photos is the

suspect's (in this way, the officer will not inadvertently cue the witness to the suspect), R. 393: 16-17; (4) photos should be presented sequentially rather than simultaneously (witnesses are otherwise inclined to make a "comparative judgment" and simply choose the person who looks most like the perpetrator), R. 393: 17-18; and (5) officers should not confirm an identification (otherwise witness confidence in the accuracy of an identification is inflated), R. 393: 18-19.

Retrieval. Dodd testified that the accuracy of an identification may also be influenced by the confirmation of prior identifications. R. 393: 20. Thus, where a witness identifies a suspect as the perpetrator in a photo spread, as in this case, her confidence in subsequent identifications is likely to increase. R. 393: 20.

SUMMARY OF ARGUMENT

In *State v. Long*, 721 P.2d 483, 492 (Utah 1986), the Utah Supreme Court held that trial courts must give an appropriate jury instruction on the factors affecting the accuracy of eyewitness identifications whenever eyewitness identification is a central issue in the case and the instruction is requested by the defense. Defendant seeks to expand *Long* to also require the admission of expert testimony on eyewitness identification whenever eyewitness identification is a central issue in the case and the proffered expert testimony will focus on the factors specific to the case that could influence the accuracy of the witness's identification. Such a rule was espoused in Chief Justice Durham lead opinion in *State v. Maestas*, 2002 UT 123, ¶¶

19-23, 63 P.3d 621, but firmly rejected by the remainder of justices. The majority preserved the trial court's traditional discretion in either admitting such expert testimony or giving a *Long* instruction. *Maestas* compels affirmance in this case.

Contrary to defendant's claim on appeal, the trial court did not misinterpret *State v. Hubbard*, 2002 UT 45, 48 P.3d 953, as creating a per se rule of inadmissibility. The court recognized that it could either admit the expert testimony or give a *Long* instruction. After analyzing the Dr. David Dodd's proposed testimony, the court simply concluded that a *Long* instruction was sufficient in this case.

Defendant claims that Dr. Dodd's testimony was necessary to advise the jury regarding concerns in this case that the witness's identification may have been influenced by suggestion, by an artificial increase in confidence with each subsequent identification, and by stress and weapon focus. These factors, however, were adequately addressed in the instruction submitted by defendant and given by the court. Accordingly, the trial court did not abuse its discretion in excluding the expert testimony.

Defendant also claims that Dr. Dodd's testimony should have been admitted under rule 702, Utah Rules of Evidence. Because defendant fails to brief this issue, this Court should not address it. In any event, the trial court's decision to exclude the testimony was well within its discretion.

ARGUMENT

THE TRIAL COURT ACTED WELL WITHIN ITS DISCRETION IN GRANTING THE STATE'S MOTION TO EXCLUDE EXPERT TESTIMONY ON EYEWITNESS IDENTIFICATION AND RULING THAT JURY INSTRUCTIONS ON EYEWITNESS IDENTIFICATION COULD SUFFICIENTLY EDUCATE THE JURY

Defendant filed a notice that he would call Dr. David Dodd to testify as an expert about "the psychological research on eyewitness identification" and "how the research applies to the specific factors of [Octavia] Martucci's identification of [defendant] from the photo spread." R. 42, 56-72, 87-142. The State moved to exclude the proposed expert testimony, arguing that it would constitute a lecture to the jury, the substance of which could be adequately conveyed in a jury instruction, that it "would invade the province of the jury to assess credibility," and that it would otherwise "cause confusion of the issues and waste time during trial." R. 73-84.

Relying on *State v. Hubbard*, 2002 UT 45, 48 P.3d 953, the trial court granted the State's motion and excluded Dr. Dodd's testimony. R. 289. After "consider[ing] the arguments presented by counsel and the testimony of Dr. Dodd offered on May 10, 2006," the trial court "f[ound] that Dr. Dodd's testimony would constitute a lecture to the jury," concluded that the jury could be educated "through the use of appropriate instructions," and "invite[d] counsel to submit instructions that . . . are appropriate in light of the evidence presented [by Dr. Dodd] regarding eyewitness

identification." R. 289. Thereafter, defendant submitted a proposed instruction on the factors affecting the reliability of an eyewitness identification and, without objection, the court gave the instruction to the jury as proposed by defendant. *See* R. 314, 316-20, 343-47; R. 396: 113-14, 130-31.

On appeal, defendant challenges the trial court's ruling as an abuse of discretion. Aplt. Brf. at 14. This claim lacks merit.

A. Trial courts have broad discretion in determining whether to admit expert testimony on eyewitness identification or to give cautionary instructions on eyewitness identification.

In *State v. Long*, 721 P.2d 483, 488 (Utah 1986), the Utah Supreme Court recognized that "human memory is both limited and fallible" and that "failures may occur and inaccuracies creep in at any stage of . . . the 'memory process.'" *Long* observed that "jurors are, for the most part, unaware of these problems" and may thus give undue weight to eyewitness testimony. *Id.* at 490, 492. To remedy this concern, *Long* held that "trial courts shall give . . . an instruction [on the factors that affect the accuracy of an identification] whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense." *Id.* at 492.

Long concluded that the instruction set forth in *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972), though imperfect, was "under most circumstances" sufficient to educate the jury on the factors affecting the reliability of eyewitness

identifications. *Long*, 721 P.2d at 494. The Court did not, however, prescribe the use of the *Telfaire* instruction or any other instruction. *Id.* at 492-94. Instead, it granted trial counsel and judges "some latitude" in formulating appropriate instructions tailored to the specific case, so long as those instructions "sensitize the jury to the factors that empirical research have shown to be of importance in determining the accuracy of eyewitness identifications, especially those that laypersons most likely would not appreciate." *Id.* at 493.

The Utah Supreme Court "'has not extended [*Long's*] cautionary instruction requirement to include additional expert testimony concerning eyewitness identification.'" *State v. Butterfield*, 2001 UT 59, ¶ 42, 27 P.3d 1133 (quoting *State v. Kinsey*, 797 P.2d 424, 427 (Utah App.), *cert. denied*, 800 P.2d 1105 (Utah 1990)). Indeed, the Court has not adopted, "either explicitly or implicitly, a per se rule of admissibility or inadmissibility . . . ." *State v. Maestas*, 2002 UT 123, ¶ 139, 63 P.3d 621 (Russon, J., dissenting in part and concurring in part); *accord Hubbard*, 2002 UT 45, ¶ 14. Instead, the decision of whether to admit expert testimony on eyewitness identification lies "within the sound discretion of the trial court." *Butterfield*, 2001 UT 59, ¶ 43; *accord Hubbard*, 2002 UT 45, ¶ 14; *Hollen*, 2002 UT 35, ¶ 66 (holding that "'trial court has wide discretion in determining the admissibility of expert testimony'" on eyewitness identification).

Eyewitness experts are generally asked to give two different kinds of testimony: (1) testimony that educates the jury on the factors known to affect the reliability of an identification, and (2) testimony that assesses the reliability of a particular identification based on those factors.

In the first scenario, the expert is asked to explain for the jury "the scientific bases and research underlying the weaknesses inherent in eyewitness identification." *Id.* Because such testimony "would apply to any crime or any trial" and does not require a "knowledge of the facts of the case," it is not "in the true sense" expert testimony, but merely "a lecture to the jury as to how they should judge the evidence." *Butterfield*, 2001 UT 59, ¶ 43.

In the second scenario, the expert is asked to "analyze [the] circumstances present when an eyewitness observed a defendant and suggest how accurate [the] eyewitness' identification is." *Hubbard*, 2002 UT 45, ¶ 17. *Hubbard* noted that "[s]uch expert testimony, regardless of whether it is presented hypothetically or by applying the circumstances of a particular case, will result in dueling experts evaluating for the jury how much weight to give to the testimony of percipient witnesses." *Id.* This kind of testimony is especially problematic because "in our judicial system it is the role of the jury to decide how much weight to give the testimony of particular witnesses, not the role of independent experts." *Id.* at ¶ 15.

The trial court is thus faced with a dilemma whenever a request is made to admit expert testimony on eyewitness identification. *Id.* If the court "[p]ermit[s] an expert witness, either directly or indirectly, to analyze the credibility of a percipient witness for the jury," the expert, to a lesser or greater extent, "steps into the province of the jury." *Id.* On the other hand, if the court excludes expert testimony "about the limitations inherent in eyewitness identifications, the jury might not be educated about the potential deficiencies of eyewitness identification." *Id. Long's* requirement that trial courts instruct juries on these potential deficiencies and the factors affecting the reliability of eyewitness identifications generally resolves this dilemma. *Cf. id.* (noting that if expert testimony is excluded, it "fall[s] upon the court to instruct the jury on the limitations and problems that research has discovered"). For this reason, trial courts have broad discretion to either admit the expert testimony or give an appropriate *Long* instruction. *See id.* at ¶¶ 17, 20.

Hubbard explained that the decision to admit expert testimony "is a matter best left to the trial court's discretion because of the trial court's superior position to judge the advisability of allowing such testimony." *Id.* at ¶ 14. *Hubbard* expressed its confidence that "[i]f the trial court determines that the better result would be to educate the jury through a *Long* instruction, counsel [will] certainly [be] able to present proposed *Long* instructions that explain the potential effects of certain

circumstances on the powers of observation and recollection and present their positions on how the *Long* cautionary instruction should be given." *Id.* at ¶ 18.

Accordingly, an appellate court will not reverse a decision to admit or exclude expert testimony absent an abuse of the trial court's broad discretion, i.e., "'unless the decision exceeds the limits of reasonability.'" *Hollen*, 2002 UT 35, ¶ 66 (quoting *State v. Larsen*, 865 P.2d 1355, 1361 (Utah 1993)). The discretion exercised by the trial court "'necessarily reflects the personal judgment of the court and the appellate court can properly find abuse only if . . . no reasonable [person] would take the view adopted by the trial court.'" *See Hubbard*, 2001 UT 59, ¶ 28 (quoting *State v. Gerrard*, 584 P.2d 885, 887 (Utah 1978)) (brackets in original). Stated another way, "the appellate court must uphold the trial court's ruling if it was within the zone of reasonable disagreement." *Weatherred v. State*, 15 S.W.3d 540, 542 (Tex. Crim. App. 2000).

B. The trial court's decision to permit *Long* instructions that included the proffered evidence from Dr. Dodd, in lieu of his testimony at trial, was well within the limits of reasonability.

Defendant argues that "[t]he trial court abused its discretion in excluding the expert testimony regarding the problems with eyewitness identification specific to this case and determining that a jury instruction could adequately educate the jury on the problems with eyewitness identification." Aplt. Brf. at 14. This argument lacks merit and the Court should therefore affirm defendant's conviction.

1. ***State v. Maestas* rejects the per se rule of admissibility espoused by defendant and compels affirmance of the trial court's ruling here.**

Citing Chief Justice Durham's opinion in *State v. Maestas*, 2002 UT 123, 63 P.3d 621, defendant asks this Court to adopt a rule requiring trial courts to admit expert testimony on eyewitness identification whenever "eyewitness identification is a central issue and the expert's testimony will focus on the specific facts of the case in relation to the scientific evidence regarding the reliability of the eyewitness identification." Aplt. Brf. at 18. He argues that given *Long's* expressed concern that jurors are largely unaware of the inherent deficiencies in eyewitness identifications, expert testimony is "essential to a defendant's ability to present a defense since without such testimony, a jury's misconceptions rather than relevant evidence could determine the outcome." Aplt. Brf. at 16-18, 21-22, 24. Because the majority in *Maestas* rejected such a rule, defendant's argument must fail.

Like defendant here, *see* R. 56-72, Maestas moved the trial court to allow Dr. David Dodd to testify generally "about the factors that affect the reliability of identifications" and to testify more particularly "about the factors specific to the *Maestas* case that could influence the accuracy of an eyewitness." *Maestas*, 2002 UT 123, ¶¶ 13, 22. As he did here, *see* R. 393: 7, "Dr. Dodd [in *Maestas*] would review police reports, eyewitness transcripts from preliminary hearings, photo spreads . . . , and then review the research most relevant to the case." *Id.* But, as in this case, *see*

R. 289, the trial court denied the motion, "ruling that a jury instruction could sufficiently inform the jury of 'concerns about and factors affecting accuracy of eyewitness identification.'" *Id.* at ¶ 13 (quoting trial court).

Chief Justice Durham authored the lead opinion in *Maestas*, but no other justice joined. The Chief Justice would have reversed on this issue, agreeing with Maestas's assertion "that he [could not] receive a fair trial without presenting expert testimony on the credibility of eyewitness identification." *Id.* at ¶ 19. In so concluding, Chief Justice Durham espoused, in effect, a per se rule of admissibility of expert testimony on eyewitness identification whenever the prosecution's case "rests on eyewitness testimony" and the proposed expert testimony is "targeted to the specific evidence in the case." *Maestas*, 2002 UT 123, ¶¶ 22-23.

The remainder of the Court rejected the Chief Justice's approach. Associate Chief Justice Durrant, joined by Justice Wilkins, rejected "the creation of [such] a per se rule" and reaffirmed the trial court's "wide discretion" to exclude expert testimony. *Id.* at ¶¶ 68, 72 (Durrant, J., dissenting in part and concurring in part). Justice Russon, joined by Justice Howe, likewise rejected Chief Justice Durham's "per se rule of admissibility." *Id.* at ¶ 139 (Russon, J., dissenting in part and concurring in part). Thus, a four-justice majority affirmed the trial court's ruling that a jury instruction, in lieu of expert testimony, was sufficient to educate the jury on the inherent deficiencies of eyewitness identifications, firmly holding that the

admissibility of expert testimony "'is a matter best left to the trial court's discretion.'" *See id.* at ¶¶ 68, 136 (quoting *Hubbard*, 2002 UT 45, ¶ 14).

The *Maestas* majority upheld the trial court's decision to rely on *Long* instructions, in lieu of expert testimony, even though Dr. Dodd was prepared to testify, as he was here, about the factors specific to the case that could influence the accuracy of the eyewitness identifications. *See id.* at ¶ 66. Where the circumstances in *Maestas* are nearly identical to those in this case, this Court must affirm the trial court's exercise of discretion in offering *Long* instructions in lieu of Dr. Dodd's testimony.

2. The trial court properly applied the analysis set forth in *State v. Hubbard*.

Defendant contends that "[r]ather than ascertaining whether the specifics of this case required expert testimony as outlined in *Hubbard*, the trial court misapplied *Hubbard* to create a per se rule disallowing the use of the eyewitness identification testimony." Aplt. Brf. at 25; *see also* Aplt. Brf. at 19-20. He accuses the trial court of "fail[ing] to do any independent analysis of the specific facts of this case in making its determination regarding how jury instructions are sufficient to adequately educate the jury on the expert's knowledge which is counterintuitive to the average juror." Aplt. Brf. at 20. This claim lacks merit.

In granting the State's motion to exclude the expert testimony, the trial court correctly observed that the admission of expert testimony "'is within the sound

discretion of the trial court.'" R. 289 (quoting *State v. Butterfield*, 2001 UT 59, ¶ 43, 27 P.3d 1133). The court reviewed the parties' arguments and the testimony of Dr. Dodd from the May 10, 2006 hearing. R. 289. After doing so, it observed "that it would *not* be an abuse of discretion to admit Dr. Dodd's testimony." R. 289 (emphasis added). The court ruled, however, that under *Hubbard*, it was "entirely appropriate . . . to instruct the jury instead of allowing expert testimony" because Dr. Dodd's testimony "would 'constitute a lecture, the substance of which can be just as adequately conveyed to the jury through the judge in a jury instruction.'" R. 289 (quoting *Hubbard*, 2002 UT 45, ¶¶ 17-18).

The trial court thus recognized that *Hubbard* required it neither to admit the expert testimony or to exclude the expert testimony. Contrary to defendant's claim, it carefully reviewed Dr. Dodd's proposed testimony in deciding whether to admit it. Therefore, the court did not interpret *Hubbard* as establishing a per se rule of inadmissibility, as defendant suggests. It simply concluded that the information that would otherwise be explained by Dr. Dodd could be adequately conveyed in an instruction. As explained, this ruling was well within the court's discretion.

3. The trial court did not abuse its discretion in excluding the eyewitness testimony because the modified *Long* instruction adequately alerted the jury to factors affecting the reliability of the eyewitness identifications specific to this case.

Defendant argues that Dr. Dodd's testimony "was necessary 'to inform the jury not only about the psychological research on eyewitness identification, but

. . . how the research applies to the specific factors of [Octavia] Martucci's identification of [defendant].'" Aplt. Brf. at 12 (citation omitted). To the extent defendant suggests that Dr. Dodd should have been able to opine on the reliability of Martucci's identification in light of these factors, defendant's claim fails because to do so would invade the province of the jury "to decide how much weight to give the testimony of particular witnesses." *See Hubbard*, 2002 UT 45, ¶ 15.

Defendant also contends that jury instructions were insufficient because they "could not adequately communicate to the jury all the concerns regarding the fallibility of the eyewitness identification specific to this case." Aplt. Brf. at 15, 22. Specifically, defendant contends that Dr. Dodd's testimony was necessary to discuss (1) "studies showing that faulty original identifications based on suggestion either intended or otherwise result in all subsequent identification being suspect," Aplt. Brf. at 23; (2) "studies showing how a witness over time through repeated exposure to the defendant within the criminal process becomes more confident that she has chosen correctly and how that identification is not necessarily accurate," Aplt. Brf. at 23; and (3) studies showing the impairing effect on memory caused by "'weapon focus,' stress, and fear," Aplt. Brf. at 24. This claim lacks merit.

Defendant has not explained why this information could not have been adequately conveyed to a jury through a cautionary instruction. These principles are not so complex that the jury could not have been informed of them through an

appropriately worded instruction. Indeed, the instruction on eyewitness identification submitted to the jury in this case (Instruction No. 14) addressed each of these three areas.

First, with respect to the effect of suggestion (intended or unintended clues by police) on the reliability of original identifications, Instruction No. 14 instructed the jury that in determining whether the identification was "completely the product of the witness' [sic] own memory," it should consider "the exposure of the witness to opinions, to photographs, or to any other information or influence that may have affected the independence of the identification of the defendant by the witness." R. 345. The instruction also instructed the jury to consider:

> (f) the circumstances under which the defendant was presented to the witness for identification. For example, you may consider that when an officer who is aware of the identity of a suspect presents a photo spread to a witness, he may inadvertently cue the witness as to which of the photos is the suspect. Similarly, a witness who is presented with six photographs simultaneously may be more likely to select one of the photos than a witness who is presented with the photographs sequentially regardless of whether the photo of the perpetrator is included.

R. 345-46. Second, with respect to the tendency that witness confidence in an identification artificially increases with each subsequent identification, Instruction No. 14 advised the jury that "a witness who has previously made an identification is likely to become more confident in making subsequent identifications and is likely to exaggerate the factors favorable to the witness's opportunity to observe the

actor." R. 344. And third, with respect to the impairing effect on memory caused by weapon focus, stress, and fear, Instruction No. 14 advised the jury that "the capacity of the witness is likely to be impaired [by] . . . stress or fright at the time of observation." R. 344. The instruction further advised that in determining whether the witnesses had an adequate opportunity to observe the perpetrator, the jury should consider "the presence or absence of distracting . . . activity during the observation." R. 344. This latter instruction was broad enough to include "weapon focus," which Dr. Dodd characterized as a form of distraction. *See* R. 393: 12, 21-22.

These instructions adequately educated the jury on the three areas complained of in defendant's brief, and as in *Maestas*, "g[a]ve [defendant] the opportunity to . . . argue how each of those factors could have affected particular eyewitnesses." *Maestas*, 2002 UT 123, ¶ 74 (Durrant, J., dissenting in part and concurring in part) (quotations and citation omitted). Defense counsel took this opportunity and argued each of these points, to a lesser or greater extent, in his closing argument. *See* R. 396: 141-45. Having received the modified *Long* instruction and listened to defense counsel's argument as to how those factors affected the reliability of the eyewitnesses, the jury needed no more assistance in making a determination about the overall reliability of the eyewitness identifications. The proposed expert testimony, therefore, would have added little, if anything, to the information provided in the modified *Long* instruction.

To the extent that the instructions did not fully cover the relevant factors identified by Dr. Dodd, defendant has invited any error. The trial court "invite[d] counsel to submit instructions that . . . are appropriate in light of the evidence presented [by Dr. Dodd] regarding eyewitness identification." R. 289. Defendant submitted the modified *Long* instruction and the trial court gave the instruction as submitted. *See* R. 314, 316-20, 343-47; R. 396: 113-14, 130-31. He cannot now complain that the instructions were inadequate. *See State v. Hamilton*, 2003 UT 22, ¶ 54, 70 P.3d 111 (refusing to address a challenge to a jury instruction approved by defendant).

In sum, [the] trial court's determination that expert testimony would amount to a lecture to the jury as to how they should judge the evidence, and its subsequent refusal to admit such testimony into evidence '[was] not an abuse of discretion, particularly where there has been no showing that the excluded evidence would probably have had a substantial influence in bringing about a different verdict.'"

Butterfield, 2001 UT 59, ¶ 43 (quoting *State v. Malmrose*, 649 P.2d 56, 61 (Utah 1982)); *accord Hubbard*, 2002 UT 45, ¶ 20.[3]

4. This Court should not address defendant's rule 702 claim because it was not adequately briefed.

Defendant notes that under rule 702, Utah Rules of Evidence, "the test of the admissibility of an expert's testimony is whether it assists the trier of fact, or in other words, whether it is helpful." Aplt. Brf. at 15. He argues that "'expert opinion is proper when it would help to clarify an issue calling for professional or technical knowledge, possessed by the expert and beyond the ken of the typical juror ....'" Aplt. Brf. at 16 (citation omitted). Defendant suggests that because the deficiencies of eyewitness identification are not within the knowledge of the average juror, he was entitled to call Dr. Dodd to testify under rule 702. *See* Aplt. Brf. at 16-17. Defendant's rule 702 claim fails at the outset because it is not adequately briefed on appeal.

---

[3] Defendant also complains that the jury instruction was inadequate because the jury did not receive it until "after all the evidence was in." Aplt. Brf. at 15. He argues that an expert is better able to educate the jury "when the jury [is] hearing the evidence and determining witness credibility." Aplt. Brf. at 15. Defendant thus suggests that the jury needed to first hear the expert testimony in order to properly evaluate the eyewitness identifications. But as defendant's witness, Dr. Dodd would not have testified until after the State called the eyewitnesses in its case in chief. Thus, defendant would not have enjoyed any timing advantage had the expert been allowed to testify. In either case, the jury would not be apprised of the *Long* factors until after the witnesses had testified.

Under rule 702, an expert "may testify" at trial if his or her "scientific, technical, or specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Utah R. Evid. 702. Utah courts have held that in making this "helpfulness" determination, "the trial court must first decide whether the subject is within the knowledge or experience of the average individual." *Larsen*, 865 P.2d at 1361. This inquiry, however, is only the first step in determining whether expert testimony is helpful under rule 702.

If the trial court concludes that the evidence is beyond the ken of the average person, it must then determine whether the expert testimony "will be more probative than prejudicial as required by rule 403 of the Utah Rules of Evidence." *Butterfield*, 2001 UT 59, ¶ 30; *accord Larsen*, 865 P.2d at 1363 n.12 (holding that court must "balanc[e] . . . the probativeness of the evidence against its potential for unfair prejudice" as required under rule 403). This second step is "an integral element of a rule 702 determination" and cannot be ignored. *Larsen*, 865 P.2d at 1363 n.12. [4]

---

[4] When expert testimony is based on novel scientific principles, Utah courts impose a three-part standard of admissibility. *State v. Rimmasch*, 775 P.2d 388, 396-98 & nn.7-8 (Utah 1989). The trial court must determine (1) "whether the scientific principles and techniques underlying the expert's testimony are inherently reliable," (2) whether "the scientific principles or techniques at issue have been properly applied to the facts of the particular case by sufficiently qualified experts," and (3) "whether the proffered scientific evidence will be more probative than prejudicial as required by rule 403 of the Utah Rules of Evidence." *State v. Crosby*, 927 P.2d 638, 641 (Utah 1996); *accord Rimmasch*, 775 P.2d at 397-98 & nn.7-8.

In making the rule 403 determination, Utah courts have held that "the relative probative value of the proffered scientific evidence of a fact in issue becomes important." *Rimmasch*, 775 P.2d at 398 n.8. "For example, if the scientific proof is based on undeniably valid scientific premises, has a high degree of power to accurately determine the existence or nonexistence of a fact in issue, and is easily replicable and its application to similar situations has been tested and validated often, then the dangers of unfair prejudice, confusion of the issues, misleading the jury, etc., attendant to its introduction would have to be great indeed to preclude its admission." *Id.* On the other hand, "if there were weaknesses in the testimony on some or all of these points, then it would be relatively easier to show that the dangers of admission outweighed the probativeness of the testimony." *Id.*

Other important variables in making the rule 403 determination include "the nature of the evidence offered, the quality of the other evidence available to the finder of fact, and the centrality of the issue to which the scientific evidence is directed." *Id.* For example, a stronger probativeness showing should be required "'when the inferences from the scientific evidence sweep broadly or cut deeply into sensitive areas,'" that is, into areas that are "central to the core of the fact-finding process—whether one witness or another is telling the truth." *Id.* (citation omitted).

On appeal, defendant addresses only the first step of the helpfulness determination, arguing that he was entitled to introduce the expert testimony

because jurors are largely unaware of the factors affecting the accuracy of eyewitness identifications. *See* R. 394: 44-47; Aplt. Brf. at 15-16. He has wholly failed to address, much less analyze, the proposed testimony under rule 403. Accordingly, the Court should decline to address defendant's rule 702 claim. *See State v. Sloan*, 2003 UT App 170, ¶¶ 13, 15, 72 P.3d 138 (declining to address claims that were not supported by legal analysis).

In any event, the trial court has "wide discretion in determining the admissibility of expert testimony" under rule 702, *Larsen*, 865 P.2d at 1361, and an abuse of that discretion will be found "'only if . . . no reasonable [person] would take the view adopted by the trial court.'" *Butterfield*, 2001 UT 59, ¶ 28 (quoting *Gerrard*, 584 P.2d at 887) (brackets in original). Where the Supreme Court has consistently held, in *Butterfield*, *Hollen*, *Hubbard*, and *Maestas*, that trial courts have the discretion to give *Long* instructions in lieu of admitting expert testimony, it cannot be said that the trial court abused its discretion in doing so here.

The Utah Supreme Court has not fully explained the relationship between rule 702 and its decisions in *Butterfield*, *Hollen*, *Hubbard*, and *Maestas*. An examination of those decisions, however, suggests that the Court's refusal to require expert testimony on eyewitness identification stems from the potential that such testimony may be unfairly prejudicial under rule 403. *See* Utah R. Evid. 403 (stating that relevant evidence may be excluded "if its probative value is substantially

outweighed by the danger of unfair prejudice"). In those cases, the Court implicitly recognizes that expert testimony on eyewitness identification carries the risk that a jury will simply accept the expert's judgments and thereby abdicate its role as fact finder on the critical issue of witness credibility. *See Maestas*, 2002 UT 123, ¶ 74 (Durrant, J., dissenting in part and concurring in part); *Hubbard*, 2002 UT 45, ¶¶ 15, 20; *Hollen*, 2002 UT 35, ¶ 70; *Butterfield*, 2001 UT 59, ¶ 43. The *Long* instruction resolves this concern while ensuring that the jury is adequately informed of the factors affecting the accuracy of an eyewitness identification. *See supra*, at 16.

Moreover, where a *Long* instruction is given, admission of expert testimony on eyewitness identification may likewise be excluded under rule 403 because it could cause "confusion of the issues," "undue delay," a "waste of time, or needless presentation of cumulative evidence." Utah R. Evid. 403; *see Butterfield*, 2001 UT 59, ¶ 44; *Maestas*, 2002 UT 123, ¶ 66 (Durrant, J., dissenting in part and concurring in part).

In sum, expert testimony would not be helpful under rule 702 where, as here, *Long* instructions adequately educate the jury on the factors affecting the reliability of an eyewitness identification and defendant can argue how those factors may have affected the eyewitness identifications. *See Maestas*, 2002 UT 123, ¶¶ 74 (Durrant, J., dissenting in part and concurring in part). The trial court below concluded that it could "educate the jury through the use of appropriate instructions instead of

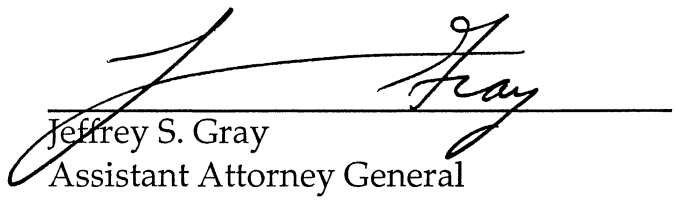
through expert testimony." R. 289. Given the risk that a jury would defer to the expert rather than make its own reliability determination, the trial court's ruling was reasonable under rule 702. *See Maestas*, 2002 UT 123, ¶ 74 (Durrant, J., dissenting in part and concurring in part).

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted June 6, 2007.

Mark L. Shurtleff
Utah Attorney General

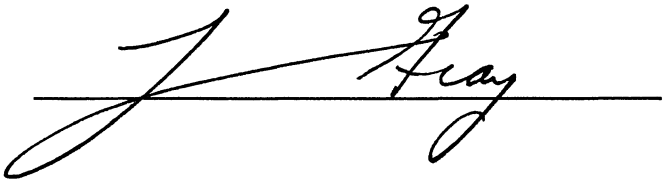


Jeffrey S. Gray
Assistant Attorney General
Counsel for Appellee

CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2007, I served two copies of the foregoing Brief of Appellee upon the defendant/appellant, Andrew Brink, by causing them to be mailed to his counsel of record as follows:

Debra M. Nelson
Salt Lake Legal Defender Ass'n
424 East 500 South, Ste. 300
Salt Lake City, UT 84111



6/6/2007 11:02 PM

ADDENDUM A

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH
SALT LAKE DEPARTMENT

STATE OF UTAH,	:	MINUTE ENTRY
Plaintiff,	:	Case No. 061900386
v.	:	Judge Sheila K. McCleve
ANDREW BRINK,	:	Date: May 31, 2006
Defendant.	:	

This matter is before the Court on the State's Motion in Limine to Exclude Expert Testimony Regarding Eyewitness Identification. Having considered the arguments presented by counsel and the testimony of Dr. Dodd offered on May 10, 2006, the Court **GRANTS** the State's Motion.

"Whether expert testimony on the inherent deficiencies of eyewitness identification should be allowed is within the sound discretion of the trial court." *State v. Butterfield*, 2001 UT 59, ¶ 43, 27 P.3d 1133 (citations omitted). While the Court finds that it would not be an abuse of discretion to admit Dr. Dodd's testimony, the Court finds *State v. Hubbard*, 2002 UT 45, 48 P.3d 953 particularly persuasive on this issue. In *Hubbard*, the court found that when an expert's testimony would "constitute a lecture, the substance of which can be just as adequately conveyed to the jury through the judge in a jury instruction, as opposed to through expert testimony," it is entirely appropriate for the trial judge to choose to instruct the jury instead of allowing expert testimony. *Id.* at ¶¶ 17-18. In the present case, the Court finds that Dr. Dodd's testimony would constitute a lecture to the jury and, therefore, the Court chooses to educate the jury through the use of appropriate instructions instead of through expert testimony.

The Court, however, is persuaded by Dr. Dodd's testimony and the supplemental materials provided by Defense counsel, that *Long* instructions may not adequately address all of the problems inherent with eyewitness testimony and particularly with photographic lineups. In following *Hubbard's* admonition that courts "specifically tailor instructions other than those offered in Long [to] address the deficiencies inherent in eyewitness identification" (*id.* at ¶ 20), the Court invites counsel to submit instructions that they believe are appropriate in light of the evidence presented regarding eyewitness identification.

DATED this 1 day of June, 2006.

Judge Sheila K. McCleve
District Court Judge

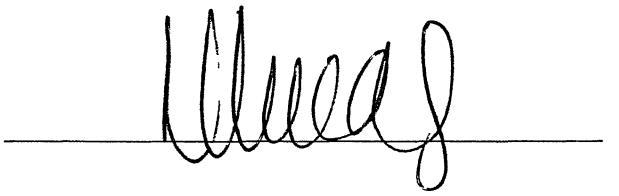
749

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry to the following, on this 1 day of ~~May~~ June, 2006.

Michael S. Colby
Deputy District Attorney for Salt Lake County
111 East Broadway, Suite 400
Salt Lake City, Utah 84111

John K. West
Salt Lake Legal Defender Association
Attorney for Defendant
424 East 5th South Suite 300
Salt Lake City, Utah 84111



790

INSTRUCTION NO. 14

An important question in this case is the identification of the defendant as the person who committed the crime. The prosecution has the burden of proving beyond a reasonable doubt, not only that the crime was committed, but also that the defendant was the person who committed the crime. If, after considering the evidence you have heard from both sides, you are not convinced beyond a reasonable doubt that the defendant is the person who committed the crime, you must find the defendant not guilty.

The identification testimony that you have heard was an expression of belief or impression by the witness. To find the defendant not guilty, you need not believe that the identification witness was not insincere, but merely that the witness was mistaken in his or her belief or impression.

Many factors affect the accuracy of identification. In considering whether the prosecution has proven beyond a reasonable doubt that the defendant is the person who committed the crime, you should consider the following:

1. Did the witness have an adequate opportunity to observe the criminal actor? In answering this question, you should consider:

(a) the length of time the witness observed the actor;

(b) the distance between the witness and the actor;

(c) the light or lack of light at the place and time of observation;

(d) the presence or absence of distracting noises or activity during the observation;

(e) any other circumstance affecting the opportunity of the witness to observe the person committing the crime.

You should also be aware that a witness who has previously made an identification is likely to become more confident in making subsequent identifications and is likely to exaggerate the factors favorable to the witness's opportunity to observe the actor.

2. Did the witness have the capacity to observe the person committing the crime? In answering this question, you should consider that the capacity of the witness is likely to be impaired if any of the following factors are present:

(a) stress or fright at the time of observation;

(b) personal motivations, biases or prejudices;

(c) Fatigue or injury.

3. Whether the witness is of a different race that the criminal actor. Identification by a person of a different race may be less reliable than identification by a person of the same race.

4. Was the identification of the defendant by the witness completely the product of the witness' own memory? In answering this question, you should consider:

(a) the length of time that passed between the original observation of the witness and the identification of the defendant by the witness;

(b) the mental capacity and state of mind of the witness at the time of the identification;

(c) the exposure of the witness to opinions, to photographs, or to any other information or influence that may have affected the independence of the identification of the defendant by the witness;

(d) any instance when the witness failed to identify the defendant;

(e) any instances when the witness gave a description of the actor that is inconsistent with the defendant's appearance;

(f) the circumstances under which the defendant was presented to the witness for identification. For example, you may consider that when an officer who is aware of the identity of a suspect presents a

> photo spread to a witness, he may inadvertently cue the witness as to which of the photos is the suspect. Similarly, a witness who is presented with six photographs simultaneously may be more likely to select one of the photos than a witness who is presented with the photographs sequentially regardless of whether the photo of the perpetrator is included.

You may take into account that an identification made by picking the defendant from a group of similar individuals is generally more reliable than an identification made from the defendant being presented alone to the witness.

You may also take into account that identifications made from seeing the person are generally more reliable that identifications made from a photograph.

If, after considering the evidence you have heard from the prosecution and from the defense, and after evaluating the eyewitness testimony in light of the considerations listed above, you are convinced beyond a reasonable doubt that the defendant is the person who committed the crime charged, and you find all of the other elements of the offense beyond a reasonable doubt, you must find the defendant guilty of the crime charged.

If, on the other hand, you are not convinced beyond a reasonable doubt that the defendant was the person who committed the crime charged, you must find the defendant not guilty of the crime charged.